

Form C

FORM TO BE USED BY A PRISONER IN FILING A PETITION FOR
A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. §2254

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA

05 SEP -8 AM 8:43

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

OFFICE OF THE CLERK

JOHN DALTON

(Enter above the full name of the
petitioner, including the name under
which petitioner was convicted.)

4:05 CV 3228

v.

PETITION FOR
WRIT OF HABEAS CORPUS

MIKE KINNEY

(Enter above the full name of the
person having authorized custody over
the petitioner.)

And the Attorney General of the
State of Nebraska (John Bruning)

1. Present place of confinement (give mailing address) Nebraska
State Penitentiary, 14th & Pioneers Blvd., P. O. Box
2500, Lincoln, NE 68542-2500.
2. Name and location of court which entered judgment of conviction
under attack Douglas county District Court, 4th Judicial
District, Hall of Justice, 17th & Farnam Street,
Omaha, NE 68103.
3. Date of judgment of conviction June 25, 1999.
4. Length of sentence twenty (20) years to thirty (30) years.
5. Nature of offense involved (all counts) Manslaughter, Use of
a Deadly Weapon in the Commission of a Felony, and
Possession of a Weapon by a Convicted Felon.
6. What was your plea? (Check one)
~~(a) --- Not guilty ---~~
(b) Guilty ☒ (based upon counsel's advice--Tim Burns)
~~(c) --- No contest ---~~
7. If you entered a plea of guilty to one count, and a plea of not
guilty to another count, please give the details.

N/A

(8) If the answer to 7 is YES, to what court, and what was the result of the appeal? Nebraska Court of Appeals; AFFIRMED.

(9) Date of result (and citation, if known) September 28, 2004.

~~XX~~ If the answer to 7 is NO, please state your reasons for not appealing. N/A

~~XX~~ As to any second petition, application, motion, or other action, please give the same information:

~~XX~~ Name of court N/A

~~XX~~ Nature of proceeding N/A

~~XX~~ Grounds raised N/A

~~XX~~ Did you receive an evidentiary hearing on your petition, application, motion, or other action?
Yes () No ()

~~XX~~ Result N/A

~~XX~~ Date of result N/A

~~XX~~ Did you appeal this ruling? Yes () No ()

~~XX~~ If the answer to 7 is YES, to what court, and what was the result of the appeal? N/A

~~XX~~ Date of result (and citation, if known) N/A

~~(XX)~~ If the answer to 7 is NO, please state your reasons for not appealing. N/A

~~XX~~ As to any third petition, application, motion, or other action, please give the same information:

~~XX~~ Name of court N/A

~~XX~~ Nature of proceeding N/A

~~XX~~ Grounds raised N/A

~~(XX)~~ Did you receive an evidentiary hearing on your petition, application, motion, or other action?
Yes () No ()

~~XX~~ Result N/A

~~XX~~ Date of result N/A

~~XX~~ Did you appeal this ruling? Yes () No ()

~~(XX)~~ If the answer to 7 is YES, to what court, and what was the result of the appeal? N/A

~~(XX)~~ Date of result (and citation, if known) N/A

~~XX~~ If the answer to 7 is NO, please state your reasons for not appealing. N/A

8. Kind of trial: (Check one)
~~(a)---Jury---~~
~~(b)---Judge only---~~
9. Did you testify at trial? Yes (---) No (---)
10. Did you appeal the judgment of conviction? Yes () No ()
11. If the answer to 10 is YES, please answer the following:
- (a) Name of court to which you appealed Nebraska Court of Appeals; and Nebraska Supreme Court.
- (b) Result AFFIRMED.
- (c) Date of result (and citation, if known) March 30, 2000.
- (d) Grounds raised on appeal **SEE APPELLATE DECISION**
12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, or other actions with respect to this judgment in any court, state or federal? Yes (XX) ~~No (---)~~
13. If your answer to 12 is YES, please give the following information:
- (a) (1) Name of court Douglas County District Court.
- (2) Nature of proceeding Post-conviction; N.R.S. § 29-3001 et seq.
- (3) Grounds raised **SEE APPELLANT'S BRIEF ON POST-CONVICTION.
- (4) Did you receive an evidentiary hearing on your petition, application, motion, or other action?
~~Yes (---)~~ No (XX)
- (5) Result DENIED.
- (6) Date of result July 30, 2004
- (7) Did you appeal this ruling? Yes (XX) ~~No (---)~~

14. State concisely every ground on which you claim you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach additional pages stating additional grounds and the facts supporting the same.

CAUTION: In order to proceed in federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for relief. You may raise grounds which you may have other than those listed. You should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts in support of it. The petition will be returned to you, unfiled, if you merely check (a) through (j) or any of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of a coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected or impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: Petitioner was denied effective assistance of counsel at trial and on direct appeal.

Supporting FACTS (tell your story briefly without citing cases or law):

Prior to entering his plea, Petitioner was not advised by his attorney of the factual and legal issues at issue as it relates to the elements of the offenses and the underlying facts that were fundamentally in dispute. Consequently, Petitioner's guilty pleas was not an informed choice in consideration of the practical alternatives.

B. Ground two: It is plain error to allow a plea to "use of a weapon" when the underlying charge is an unintentional crime.

Supporting FACTS (tell your story briefly without citing cases or law):

At the time Petitioner entered a plea to Use of a Weapon, the law in Nebraska was clear that manslaughter is an unintentional crime. It is also clear that an individual could not be convicted of use of a weapon when the underlying crime was an unintentional crime.

C. Ground three: Petitioner received ineffective assistance of counsel in violation of the 6th Amendment-U.S.Const.

Supporting FACTS (tell your story briefly without citing cases or law):

Because of the foregoing facts, the plain error cited above, and the prejudicial representation of being ineffective assistance on counsel part, Petitioner did not receive appropriate due process of law, nor effective assistance by counsel, to which he was due, in the interest of justice, and as a matter of law.

D. Ground four: _____

Supporting FACTS (tell your story briefly without citing cases or law):

15. If any of the grounds listed in 14 A, B, C, or D were not previously presented to the state's highest court, state briefly what grounds were not so presented, and give your reasons for not presenting them. **SEE ABOVE** Same as above.

16. Do you have any petition, application, motion, or other proceeding now pending in any court, state or federal, as to the judgment attacked by this petition? ~~Yes (---)~~ No (XX)

- XX. If the answer to 16 is YES, please give the following information:

(XX) Name of court N/A

XXX Nature of proceeding N/A

XXX Date filed N/A

XX) Docket number N/A

XXX Judge to whom assigned N/A

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Lavon Stennis

(b) At arraignment and plea Lavon Stennis

(c) At trial Timothy P. Burns

(d) At sentencing Timothy P. Burns

(e) On appeal Timothy P. Burns

(f) In any postconviction proceeding Michael J. Lehan

(g) On appeal from any postconviction proceeding Michael J. Lehan

19. Were you sentenced on more than one count in the same court and at the same time? Yes (XX) ~~No (---)~~

20. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? ~~Yes ()~~ No (XX)
- XX. If the answer to 20 is YES, please give the following information:
XXX Name and location of the court which imposed the sentence and to be served in the future N/A

(XX) Date and length of the sentence N/A

- (XX) Have you filed, or do you plan to file any action attacking the judgment which imposed the sentence to be served in the future? Yes () No ()

22. (optional) Did any other person help you in preparing this petition? ~~Yes ()~~ No (XX)

- XX. (optional) If the answer to 22 is YES, please give the name of the person who helped you. N/A

N/A

(Signature of Person)

24. Do you wish the court to appoint counsel to represent you in this case? Yes (XX) ~~No ()~~

25. If the answer to 24 is yes, please state what efforts you have made to obtain counsel, and the reasons you think counsel should be appointed? The issues involved in the petition at bar are too complex for the Petitioner to grasp as he has no understanding of the law as demonstrated to this Court in the proceedings below.

Wherefore, the petitioner prays that the court grant him relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

8-5-05

(Date)

John Dalton

(Signature of Petitioner)

John Dalton 53146
P.O. Box 2500
Lincoln, NE 68542

John Dalton 53146
P.O. Box 2500
Lincoln, NE 68542-2500
Nebraska State Penitentiary

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